No. 88-266 (5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

OKLAHOMA TAX COMMISSION,
Petitioner,
v.
JAN GRAHAM, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF *AMICI CURIAE* SENECA NATION OF INDIANS AND THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI

The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation and the Seneca Nation of Indians are large and important federally recognized Indian tribes. The Fort Peck Reservation is located in Montana. The Seneca Nation's three Reservations are located in New York.

The Tribes have an interest in this case because under existing law states have no authority to subject Indian tribes to coercive state court jurisdiction. Both the As-

siniboine and Sioux Tribes and the Seneca Nation desire to be protected from coercive state court jurisdiction in the event suit is brought against them or their economic enterprises.

Both Tribes are involved in economic activity where revenue is generated to fund needed governmental services. For example, the Assiniboine and Sioux Tribes own and operate a federal defense plant, one of the largest industrial employers in Montana. The Seneca Nation owns and operates several enterprises, which include service stations, a campground and gaming establishments.

Amici Tribes file this brief to urge this Court to uphold the Court's earlier decisions that, in the Tribes' view, have held that states have no legislative power to tax tribes or Indians on Indian trust lands, and state courts have no subject matter jurisdiction to enforce state laws, absent specific congressional authority. Any authority states do have in these circumstances is thus conferred by federal law.

All parties have consented to the filing of this brief *amicus curiae*, and those consents have been lodged with the Clerk.

SUMMARY OF ARGUMENT

Removal should be sustained because federal law has completely displaced state law where a state seeks to exercise authority over Indian tribes on Indian trust lands. This case therefore is one where the well-pleaded complaint rule does not operate because of complete federal preemption. *Caterpillar Inc. v. Williams*, 482 U.S. ——, 96 L.Ed.2d 318, 327-328 (1987); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

This complete preemption dates from the earliest days of the Republic with the exclusive power vested in Congress over relations with Indian tribes contained in the Constitution. Complete preemption is continued by nine-

teenth century cases, *E.g., Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), by the Oklahoma Enabling Act, and by modern decisions of this Court. *E.g., Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985).

Complete preemption is especially clear in the "special area" of Indian taxation. Decisions of this Court establish that states have no legislative power to tax tribes or Indians on Indian trust lands, and state courts have no subject matter jurisdiction to enforce state taxes, except where Congress has specifically conferred that legislative and judicial authority on a state. *California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244 (1987); *Blackfeet Tribe, supra.* A state's assertion of the power to tax an Indian tribe on tribal trust lands must necessarily derive, therefore, from federal law, not from some inherent power of the state. For this reason, the present suit, or any suit by a state asserting taxing authority over a tribe on tribal trust land, "arises under federal law" and is removable to federal court. *Oneida, supra.*

Since, moreover, the state court lacks subject matter jurisdiction, *e.g., Williams v. Lee*, 358 U.S. 217 (1959), and at the time the case was removed federal courts had only derivative jurisdiction over removed cases, the case was properly dismissed. For that reason, rather than on grounds of tribal sovereign immunity, this Court should accordingly affirm the judgment of the court of appeals.

ARGUMENT

The State brought this action in state court to collect state taxes from a business enterprise owned and operated by a federally recognized Indian Tribe located on lands held in trust for the Tribe by the United States. The case was removed by the Tribe to federal court. *Amici* Tribes submit that removal was proper, but on different grounds from those determined by the lower courts.

I. The State's claim arises under federal law.

A. Controlling principles on removal jurisdiction.

As this Court held in *Caterpillar Inc. v. Williams*, 482 U.S. ——, 96 L.Ed.2d 318, 327 (1987) (footnote omitted):

> Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant . . . . The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

Where preemption arises only by assertion of a federal constitutional or statutory provision as a defense to a claim based entirely on state law, removal is improper (*ibid*)

> even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983).

On the other hand, this Court has created an exception to the well-pleaded complaint rule, holding in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. ——, 95 L.Ed.2d 55, 63 (1987) (emphasis added) that:

> . . . Congress may so *completely pre-empt* a particular area, that any civil complaint raising this select group of claims is necessarily federal in character.

Accord, Caterpillar, 482 U.S. at ——, 96 L.Ed.2d at 327-328. In areas completely preempted by federal law "any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at ——, 96 L.Ed.2d at 328. Thus, in areas "completely preempted" by federal law, all claims arise under federal law, even if only state law claims appear on the face of the complaint. The theory is that in these subject areas, federal substantive law has completely displaced state law principles.

The first case to find such complete preemption was *Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968). The petitioner there filed suit in state court against a union, seeking to enforce a collective bargaining contract. The "petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts." *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983). Nevertheless, the Court in *Avco* held the claim to be completely preempted by Section 301 of the Labor Management Relations Act (LMRA)—which specifically provides a federal cause of action for matters relating to collective bargaining agreements.[1] As recently characterized by the Court, *Avco* held that the complaint arose under federal law because

> [t]he pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301.

Franchise Tax Board, 463 U.S. at 23.

Similarly, in *Metropolitan Life, supra*, an employee filed suit in state court alleging contract and tort claims

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[1] 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

arising out of denial of disability benefits. The court of appeals found that the "complaint stated only state causes of action," and that issues involving the federal Employee Retirement Income Security Act (ERISA) arose only by way of defense. 481 U.S. at ——, 95 L.Ed.2d at 62. This Court reversed, finding the employee's claims to be completely preempted by ERISA. The Court noted that the jurisdictional provision of ERISA [2] "closely parallels that of § 301 of the LMRA." *Id.* at 64. Moreover, the legislative history of the ERISA civil enforcement provision clearly stated that claims within its scope were intended to arise under federal law, in a manner like claims brought under Section 301 of the LMRA. Thus, although the suit "purports to raise only state law claims, [it] is necessarily federal in character by virtue of the clearly manifested intent of Congress." *Id.* at 65.

This complete preemption exception to the well-pleaded complaint rule is not without careful limitations. It applies only with respect to causes of action which are central to the preemptive federal scheme.[3] *E.g.*, *Caterpillar*,

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[2] Section 502(f) of ERISA, 29 U.S.C. § 1132(f), provides:

> The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided in subsection (a) of this section in any action .

[3] In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), the state brought an action in state court to collect unpaid state income taxes against an ERISA covered benefit plan. This Court held that the claims did not arise under ERISA—which was concerned with employee benefits, not state tax collection:

> Unlike the contract rights at issue in *Avco*, the State's right to enforce its tax levies is not of central concern to the federal statute [ERISA].

Franchise Tax Board, 463 U.S. at 25-26.

The Court noted that since the ERISA statutory scheme creates express federal causes of actions for particular classes of persons—

482 U.S. at ——, 96 L.Ed.2d at 327-328. In *Caterpillar* the plaintiff alleged breach of individual employment contracts by management and salaried employees who were not covered by a collective bargaining agreement. This Court held that this action was *not* completely preempted by § 301 of the Labor Management Relations Act, stating:

> Section 301 says nothing about the content or validity of individual employment contracts.
>
> • • • •
>
> [R]espondents' complaint is not substantially dependent upon interpretation of the collective bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement.

Caterpillar, 482 U.S. at ——, 96 L.Ed.2d at 328-329.

Thus, *Caterpillar* reinforces the proposition that a cause of action must fall directly within the comprehensive federal scheme for the complete preemption doctrine to apply.

Read together, these cases suggest that "complete preemption" will be found where a complaint, fairly read, raises a cause of action which is central to a comprehensive scheme of federal law intended to displace state law. The cause of action must go to the heart of the federal concern, and not be merely tangentially related.[4]

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beneficiaries, participants, fiduciaries and the Secretary of Labor—the Court would not expand the Act by providing that actions by others were completely preempted. Likewise, ERISA expressly preserves certain state law causes of action—concerning regulation of insurance, banking, or securities. *Id.* at 25. These statutory provisions buttressed the Court's conclusion that an action by a state to collect state taxes does not arise under federal law as a result of complete preemption by ERISA.

[4] Further, where federal substantive law is comprehensive, but Congress has specifically limited the availability of federal remedies, the Court has refused to expand the availability of a federal forum

B. Decisions of this Court establish that, from the beginning of the Republic, federal law has completely displaced state power over Indian tribes on Indian trust lands.

As discussed in Section I.A., *supra*, the most recent cases dealing with the "complete preemption" exception concerned the effect of the LMRA and ERISA. Those decisions cite a leading Indian law case, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*See Caterpillar*, 96 L.Ed.2d at 328, n.8 and *Franchise Tax Board*, 463 U.S. at 23, n.25) as another example of this exception.

Oneida was an ejectment action brought by a tribe in federal court asserting its federally protected Indian title. The court of appeals had ruled that the Tribe's possessory claim did not present a federal question under the well-pleaded complaint rule. This Court reversed, recognizing that both the source and continued protection of Indian title were matters of federal law. *Oneida*, 414 U.S. at 670 (the "federal law, treaties, and statutes protected Indian occupancy" [and] "termination [of tribal title] was exclusively the province of federal law").[5] As Justice Rehnquist stated: "the Federal Government has shown a continuing solicitude for the rights of Indians in their land . . . . Thus, the Indians' right to possession in this case is based not solely on the *original* grant of rights in the land but also upon the Federal Government's subsequent guarantee." *Id.* at 684 (Rehnquist, J. concurring) (emphasis in original).

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by finding complete preemption. *E.g., Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986).

[5] The Court relied on the fundamental principle of federal Indian law, expressed by Chief Justice Marshall, that relations with the Indian tribes, "according to the settled principles of our constitution, are committed exclusively to the government of the Union." *Oneida*, 414 U.S. at 671, quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

As in *Oneida*, in this case the State asserts a right to tax "conferred by federal law, wholly independent of state law." For the State can have no authority to tax tribal activities on tribal trust lands *unless* that authority has been conferred by federal law. This is because, as this Court has repeatedly held, state taxation of tribes and Indians on Indian trust lands is the *exclusive* province of federal law:

> The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), *citing Worcester v. Georgia*, 6 Pet. 515, 561 (1832). As a corollary of this authority, . . . Indian tribes and individuals generally are exempt from state taxation within their own territory.

Montana v. Blackfeet Tribe, 471 U.S. 759, 764 (1985).

See also Oneida, 414 U.S. at 667 ("Once the United States was organized, and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of federal law").

In the early case of *United States v. Forty Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876), this Court contrasted the power of Congress and the states over Indians under the Articles of Confederation and under the Constitution. It observed that in the Articles: ". . . two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." *Id.* at 195. The Court concluded that:

> [O]f necessity, these limitations rendered the power of no practical value. This was seen by the Convention which framed the Constitution; . . . The only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government. Their peculiar habits and character required this; . . . .

Thus, state control over Indian commerce under the Articles was replaced by the Constitution which "provid[ed] that intercourse and trade with the Indians should be carried on *solely* under the authority of the United States" (emphasis supplied).[6]

The continued exclusive control of Congress over Indians on Indian lands was expressly preserved in the Oklahoma Enabling Act, Section 1 of which reads:

> [N]othing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed."[7]

As this Court held in *Tiger v. Western Investment Co.*, 221 U.S. 286, 309 (1911): "[i]n passing the enabling act for the admission of the state of Oklahoma . . . Congress was careful to preserve the authority of the government of the United States over the Indians, their lands and property, which it had prior to the passage of the act." *See also McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 175-176 (1973).

"Complete preemption" as an exception to the well-pleaded complaint rule is thus even stronger in the Indian area than under LMRA and ERISA. State courts have concurrent subject matter jurisdiction over cases concerning the LMRA and ERISA, although they must apply federal law, *International Brotherhood of Electrical Workers v. Hechler*, 481 U.S. ——, 95 L.Ed.2d 791, 799 (1987);

[6] *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 558-559 (1832).

[7] Act of June 16, 1906, ch. 3335, 34 Stat. at 267-68.

Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508 (1962). This subject matter jurisdiction derives from state common law, and predates the congressional statutes involved.[8] But in the Indian area, as this Court explained in *Three Affiliated Tribes v. Wold Engineering Co.*, 476 U.S. 877, 879 (1986), "[h]istorically, Indian territories were generally deemed beyond the legislative and judicial jurisdiction of the state governments." States have never had authority to impose their taxes on Indians on Indian trust lands, and state courts entirely lack subject matter jurisdiction to enforce such taxes. See pp. 16-17, *infra*. This authority can *only* be conferred upon states by Congress, and if it is conferred, the authority arises under federal law, not state law. In this case, therefore, as in *Oneida*, the rights asserted by the state "do not depend on . . . any . . . statutes of the State, but upon" federal law. *Oneida*, 414 U.S. at 672.

The preemptive authority of federal law is especially clear in the area of state taxation of Indians on Indian lands. Decisions of this Court stretching back to just after the Civil War firmly establish that states have no jurisdiction to tax Indians on Indian lands. In *Kansas Indians*, 72 U.S. (5 Wall.) 737, 755-756 (1867), this Court held that lands allotted by treaty to individual Shawnee Indians remained "under the control of Congress," and that since under the Constitution "there can be no divided authority . . . they enjoy the privilege of

[8] This case also presents more complete federal preemption than *Mesa v. California*, 813 F.2d 960 (9th Cir. 1987), *petition for cert. granted* No. 87-1206. In *Mesa*, federal postal employees removed state traffic prosecutions that present no question of federal law, either in the indictments or in the issues raised in defense. In *Mesa*, the state laws that were violated had no connection with federal law or authority.

The Constitution does not provide for exclusive federal jurisdiction over cases involving federal employees. State power to prosecute federal employees for traffic offenses, unlike the power to tax tribes on tribal lands, does not derive from a delegation of power by Congress. It arises under state, instead of federal, law.

total immunity from state taxation." In *New York Indians*, 72 U.S. (5 Wall.) 761, 770-771 (1867), this Court held that a state tax on Indian lands would be an "unwarrantable interference" with the Indians' "undisturbed enjoyment of" their lands as guaranteed by federal law. *Accord, Blackfeet Tribe*, 471 U.S. at 764-765; *McClanahan v. Arizona Tax Comm.*, 411 U.S. at 168-169.

As this Court stated in *Blackfeet Tribe*, 471 U.S. at 765, "this Court has never wavered from the views expressed in these cases." Indeed, in the "special area of state taxation of Indian tribes and tribal members" on Indian trust land, this Court has even "adopted a *per se* rule" to the effect that the pre-emptive power of federal law automatically invalidates state taxation of Indians on Indian trust lands absent express congressional authorization, *California v. Cabazon Band of Mission Indians*, 480 U.S. ——, 94 L.Ed.2d 244, 258 n.17 (1987) (emphasis added). *See also Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (". . . *in the special area of state* taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or income from activities carried on within the boundaries of the Reservation . . ."). [9] While a balancing of federal, tribal and state interests is generally required with respect to most other Indian jurisdictional matters, *e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 148 (1980), this Court has found the tribal and federal interests inherent in tribal tax immunities to so far out-

[9] As this Court has stated:

> In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted *only* when Congress has made its intention to do so unmistakably clear.

Blackfeet Tribe, 471 U.S. at 765 (emphasis added).

weigh any possible state interests that federal law always controls.

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

Cabazon, 480 U.S. ——, 94 L.Ed.2d at 258 n.17.

The teaching of these cases for present purposes is that from the adoption of the Constitution, states have had no inherent power to tax Indian tribes on Indian trust lands. Congress can confer that power on states, and when it exercises power delegated by Congress, a state does so as a matter of federal law. *E.g., Parker v. Richard*, 250 U.S. 235, 239 (1919) (Congress has the constitutional power to delegate authority to Oklahoma state courts to administer estates of allottees of the Five Tribes, and a state court exercising that authority conferred by Congress "acts as a Federal agency"). As this Court recently reiterated in *National Farmers Union v. Crow Tribe*, 471 U.S. 845, 852 (1985), in "all" cases involving tribal immunity from state taxation "the governing rule of decision has been provided by Federal law."

As in *Oneida, id.* at 675-676, *Gully v. First National Bank*, 299 U.S. 109 (1936), is distinguishable because any cause of action in favor of the state arises under federal, not state, law. In *Gully*, the state tax collector sued a national bank for taxes owed by a corporation it had acquired. In the acquisition agreement, the national bank had promised to pay all debts and liabilities of the acquired company. As this Court explained in *Oneida*, *Gully* was a "suit . . . on a contract having its genesis in state law, and the tax that the defendant had promised

to pay was imposed by a state statute. The possibility that a federal statute might bar its collection was insufficient to make the case one arising under the laws of the United States." *Id.*, 414 U.S. at 675-676. Here, unlike *Gully*,[10] the underlying cause of action—if it exists at all—is wholly independent of state law. The question is whether Congress has created this cause of action by an act conferring authority on the state to tax and subject matter jurisdiction on state courts to enforce that tax. Even if Congress has done this, the cause of action arises under federal law.

To be sure, as in *Gully*, the State here relies on its own taxing statutes. But unlike *Gully*, there is no common law state court contract claim,[11] and those statutes can have no force over the tribe on tribal trust lands as a matter of state law. The State can have the taxing authority it claims *only if* Congress has conferred it upon the State. Federal, not state, law sets the scope of any state rights to tax the tribe here, "wholly apart from the application of state law principles." *Oneida*, 414 U.S. at 677.

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[10] In addition, *Gully* was decided more than 30 years before the Court first articulated the complete preemption doctrine in *Avco*, 376 F.2d 337, 339-340 (6th Cir. 1967), *affirmed*, 390 U.S. 557 (1968). The complete preemption doctrine provides an *exception* to the well-pleaded complaint rule. Thus, where there is complete preemption, a complaint arises under federal law even though it alleges only violations of state law. *Avco*, 390 U.S. at 554-560. Literal application of *Gully* would negate all this Court's jurisprudence on complete preemption. Properly understood, *Gully* stands for the proposition that, in the absence of complete preemption, a federal question must appear on the face of the complaint for the case to "arise under" federal law. It does not, as petitioners argue here, foreclose application of this Court's complete preemption principles.

[11] There might be such a claim if the Tribe had entered into a tax enforcement agreement with the State, as many tribes have done, providing for the Tribe to impose and collect certain taxes similar to those of the State, and the State were suing to enforce that agreement.

The State seeks to avoid these principles by arguing that the Chickasaw Nation's reservation and tribal authority was disestablished, and therefore that the State is lawfully entitled to tax tribal activities because they are outside any reservation (Br. pp. 12-29).[12] It also argues that state law is applicable within Indian county in Oklahoma (Br. pp. 29-37).

Amici Tribes submit that the State is wrong on the merits of these contentions. For present purposes, however, the arguments avail the State nothing. For it is beyond question that *if* Congress has conferred authority on Oklahoma to tax these tribal activities—whether by disestablishing the Nation's reservation or government or by making state law applicable within Indian country in Oklahoma or in some other fashion—that authority derives from federal and not state law. *See e.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 585-586 (1977). The Chickasaw Nation is concededly still under the continu-

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[12] The State relies on *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The lands in *Mescalero* had never been part of that Tribe's reservation, were not held in trust for it, and were simply leased to the Tribe for 30 years. *Id.* at 146. By contrast, the lands in this suit were part of the Chickasaw Nation's historical reservation and are today held in trust for the Tribe by the United States.

Amici Tribes submit that the present record is insufficient for this Court to determine the disestablishment question, and greatly doubt that the Reservation was disestablished when the Atoka Agreement was ratified by Congress. That Agreement provided for allotment of most tribal lands and agreed to opening of other lands to homesteaders. These kinds of statutes have sometimes been construed to disestablish reservations, *E.g.*, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), and sometimes not to do so, *E.g.*, *Solem v. Bartlett*, 465 U.S. 463 (1984). Even if the Reservation were disestablished, the Chickasaw Nation's tribal government was clearly continued by the Act of April 26, 1906, ch. 1876, 34 Stat. 137, and exists today, and the tribal trust lands on which the motel is located are unquestionably Indian country under 18 U.S.C. § 1151. *United States v. John*, 437 U.S. 634, 648-653 (1978); *See United States v. McGowan*, 302 U.S. 535 (1938).

ing protection of federal law. Thus, any claim by the State to tax the Tribe's activities on its lands is one arising under federal law, and hence removable to federal court.

II. The case below was properly dismissed, because the state court had no subject matter jurisdiction.

Since the case was properly removed, this Court should review its dismissal by the courts below. *Amici* believe dismissal was proper, although not on the ground determined by the court of appeals.

Much of the State's brief, as well as the opinion below, concerns the issue of whether a suit against a tribe necessarily entails a federal question as a result of the Tribe's immunity from suit. The argument focuses on whether in the context of this case, tribal sovereign immunity is a jurisdictional barrier, inherent in the petitioner's complaint, or whether it is more properly characterized as a defense. The court of appeals focused its analysis on this question.

Amici Tribes submit that this Court need not reach that issue, because this case was properly dismissed, albeit on the narrower ground that the state court lacked subject matter jurisdiction over a claim against an Indian tribal defendant on Indian trust lands. Thus, the federal court acquired no jurisdiction on removal.[13]

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[13] At the time this action was filed, 28 U.S.C. § 1441 required federal court dismissal of a removed action as to which the state court lacked jurisdiction. *See* Wright, Miller & Cooper, Federal Practice and Procedure § 3721, p. 196. As this Court stated in *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 382 (1922):

> If the state court lacks jurisdiction. . . . the Federal court acquires none [on removal], although it might in a like suit originally brought there, have had jurisdiction. (Citations omitted.)

[Continued]

This Court's decision in *Williams v. Lee*, 358 U.S. 217 (1959), clearly establishes that the exercise of coercive state court jurisdiction over an involuntary Indian defendant "infringe[s] on the right of reservation Indians to make their own laws and be ruled by them," unless Congress has authorized that jurisdiction. *Id.* at 220. A number of cases subsequent to *Williams* confirm the absence of state court subject matter jurisdiction over Indian defendants on Indian lands. *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 148-149 (1984) (state court jurisdiction "over claims by Indians against non-Indians" implicates very different interests and does not impede tribal self-government); *Bryan v. Itasca County*, 426 U.S. 373, 383-384 (1976) (Public Law 280 construed to confer subject matter jurisdiction on state courts to resolve private legal disputes, not upon states to tax); *Fisher v. District Court*, 424 U.S. 382 (1976); *Kennerly v. District Court*, 400 U.S. 423 (1971) (only Congress can confer jurisdiction on state courts over reservation Indian defendants).[14]

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[13] [Continued]

On June 19, 1986, Congress amended 28 U.S.C. § 1441, reversing the "derivative jurisdiction" rule of *Lambert Coal Co.* by adding a new section 28 U.S.C. § 1441(e) as follows:

> The court to which such civil action is removed is *not* precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

Judicial Improvements Act of 1985, Public Law No. 99-336, § 3, 100 Stat. 633, 637 (1986). The amendment applies only to actions filed in state court after the date of enactment. Wright, Miller & Cooper, Federal Practice and Procedure § 3271 (1988 pocket part), p. 10.

[14] If the Court is nevertheless inclined to examine the sovereign immunity issue, *Amici* Tribes offer the following framework.

This Court has long recognized tribes as possessing common law immunity from suit. *Turner v. United States*, 248 U.S. 354 (1919); *United States Fidelity & Guaranty*, 309 U.S. 506 (1940); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Under traditional principles of sovereign immunity, an exception exists where a

CONCLUSION

This case goes to the core concern of preemptive federal Indian law—protecting tribes from assertions of state authority over tribal activities on tribal trust lands. Federal preemption is especially complete where state taxation of Indians is involved. This is not a case like *Caterpillar*, where the claim was unrelated or at most tangential to the area of federal preemption. Since federal law completely preempts state authority over Indian tribes on tribal trust lands, this case "arises under" federal law and was properly removed.

The judgment below should be affirmed.

Respectfully submitted,

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complaint alleges that named government officials acted outside the authority the sovereign is capable of bestowing. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).

Applied to tribal sovereign immunity, this principle would enable suits to be brought in federal courts under 28 U.S.C. § 1331 against tribal officials to enjoin conduct allegedly outside the scope of the lawful authority of those officials. *National Farmers Union v. Crow Tribe*, 471 U.S. 845, 856 (1985). *See Tenneco Oil v. Sac & Fox Tribe*, 725 F.2d 572 (10th Cir. 1984); *Babbitt Ford Inc. v. Navajo Tribe*, 519 F. Supp. 418, 424-25 (D.Ar. 1981), *aff'd in part, rev'd in part*, 710 F.2d 587 (9th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). This approach would not authorize federal court interference with respect to the propriety or manner tribes exercise their authority, but it would provide a federal forum for testing acts of those officials alleged to be beyond their legal authority altogether.